Supreme Court No. 99331-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79754-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RALPH A. HEINE,
Appellant,

v.

TIM S. RUSSELL and ROBERTA A. RUSSELL and their marital community; JOHN PURDY, a single man; and NORMAN STOW and SARINA STOW and their marital community; and WILLIE R. KENDALL, a single man,

Respondents

and

STEVEN RUSSELL and STEPHANIE COLEMAN

Defendants.

NORMAN AND SARINA STOWS' ANSWER TO RALPH A. HEINE'S PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Constitutional Provisions, Statutes and Other Authority

I. INTRODUCTION

Petitioner Heine seeks to quiet title through adverse possession to the eastern portion of a 30' wide parcel of land that has, since 1966, been encumbered by an Easement for ingress and egress benefitting the residential properties of Petitioner Ralph Heine, and Respondents Stow, Russell, and Kendall.[1] Heine's adverse possession claim, which seeks to extinguish the easement rights of all the Respondents in addition to the title by servient estate owner John Purdy, was dismissed on summary judgment by the Snohomish County Superior Court. That dismissal was just affirmed by the Court of Appeals. Contrary to Heine's assertion, the appellate court's decision was not one of "first impression." Rather, the court found that Heine failed "to establish issues of fact about the requisite elements" for his adverse possession claim based on well-established precedent. In addition, there is nothing about the nature of this private controversy between neighbors that rises to the level of "public interest" that should be determined by this Court. Heine fails to show that this case meets the threshold for review by the Supreme Court, and this Court must therefore reject his petition.

[1] Heine is also seeking review regarding a prescriptive easement claim pertaining to a part of the Russells' property along the western portion of the Easement. The Stows' sole interest in this matter relates to the adverse possession claims being asserted by Heine over the western portion of the Easement.

II. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should decline review of an appellate court decision determining a claim of adverse possession based on well-established precedent that does not conflict with any published decision, including the *Timberlane* case? **Short Answer: Yes**.
2. Whether this Court should decline review of an appellate court decision determining a claim of adverse possession that involved a private dispute between neighbors based on a very specific set of facts, the resolution of which does not present any potential for confusion amongst that lower courts that would make the matter one of public interest? **Short Answer: Yes.**

III. STATEMENT OF THE CASE

This case involves a 30-foot wide parcel of land that has, since 1966, been encumbered by an Easement for ingress, egress, and utilities benefitting the residential properties of Petitioner Ralph Heine, and Respondents Norman and Sarina Stow, Tim and Roberta Russell, and Willie Kendall. **CP 700**. The Easement was originally granted by the then-owners of the easement parcel, Donald and Mary Wagner, who are the predecessors of the property owned by John Purdy. ***Id***. The Easement was conveyed to the Allpresses, owners of adjacent property that was later divided into the properties owned by Russell, Stow, Kendall, and Heine.

Historically, the western portion of the Easement contains a gravel road (approximately 12.5' wide) used by the parties for access to the respective driveways, while the eastern portion of the Easement remained undeveloped for vehicle access. That eastern portion is occupied by grass, landscaping, rocks, trees, some gravel parking areas, etc. *See* **CP 703-704**. These types of features were maintained by Heine's predecessor owners—Pamela and Robert Styles—from 1976 to 2005. **CP 707, 708**. Heine also maintained many of these features during his ownership of the property since 2009. **CP 712-714**. These features are typical of the neighborhood use of the areas abutting the gravel road. **CP 702, 3-4.**

Plaintiff Heine now seeks to obtain, through adverse possession, a 23-foot portion of the eastern part of the Easement. **CP 880-903**. The new claim, as asserted, would defeat Purdy's record title to that area, and extinguish the Easement rights with respect to all parties benefited by the Easement, including the Stows.

V. ARGUMENT

Heine asks this Court to accept review of this matter based on RAP 13.4(b)(2) and (4), which allows review where the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. In this case, Heine does not present a

sufficient basis for review under either standard.

First, the appellate court followed well-established Washington case law in determining that Heine failed to show that his possession of the disputed property was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile as required to establish adverse possession. ***See*** **Appendix A to Heine Petition for Review** ("**App. A**"). The court followed the general rules in Washington that termination of easements that are disfavored and hostile use with respect to extinguishment of an easement requires using the land in a manner inconsistent with the rights of other dominant estate owners. The appellate court correctly concluded that the use of the eastern portion of the easement by Heine and his predecessors, the Styles were not inconsistent with the current use of the Easement for overhead or underground utilities, or future use for egress and ingress. The court's decision in this regard is not in conflict with any other published decision by the Court of Appeals, regardless of any ambiguities.

Second, neither the alleged conflict between appellate cases nor Heine's shifting easement theory makes this case one of public interest. Heine ignores legal precedent holding that the public interest standard requires a showing of future confusion and unnecessary litigation regarding a common issue, and instead makes conclusory assertions or asks this Court to accept a different standard when determining if this case presents a public interest.

There is no question the Court should reject review of this matter.

A. The Appellate Court Followed Long-Established Precedent Regarding the "Hostile" Use Element of Adverse Possession and Did Not Answer a Question of First Impression.

Heine incorrectly argues that the appellate court's decision conflicts with the decision in *Timberlane Homeowners Ass'n v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995). Heine also mistakenly asserts that the appellate court answered a question of first impression regarding the non-exclusive easement rights of co-dominant estate owners.

Turning first to the issue of conflicting case law, the Stows acknowledge that the appellate court primarily addressed the issue of whether the Easement was extinguished, and did not expressly distinguish its analysis of Heine's claim over the fee title to the servient estate. However, that ambiguity does not present a direct conflict with the *Timberlane* case necessitating review under RAP 13.4(b) nor is it the issue that Heine asks this Court to consider. Heine's "Issues Presented for Review" specifically asks this Court to decide if his use of the easement property is hostile to "all who claim an interest" in the disputed property merely because the use allegedly exceeds the scope of the express easement.[2] The answer to that question is clearly "no" based on well-

[2] Under RAP 13.7(b), the Supreme Court may decline to consider an issue that, although "raised" in the argument section of the proponent's petition for review, is not clearly raised in the concise statement of issues presented for review as required by RAP 13.4(c)(5). *State v. Korum*, 157 Wn.2d 614, 624, 141 P.3d 13, 19 (2006). Here, Heine attempts to distinguish his claim over the servient estate versus the extinguishment of the easement later on in his argument section, but fails to differentiate the two in his issues presented for review. This alone merits dismissal of his petition.

established Washington case law relied on by the appellate court in its opinion.

The relevant cases guiding the appellate court's opinion, including *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962); *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002), establish the general rule that an easement is not extinguished unless it unreasonably interferes with the rights of the other dominant estate owners (Russells/Kendall/Stows). ***See*** **App. A at 5-6**. There is absolutely no authority to distinguish adverse possession of an easement based on whether the party seeking to quiet title is a servient or dominant estate owner. The test is the same for either. *See* Restatement 3d of Prop: Servitudes, § 7.7 cmt. a-c (3rd 2000) (setting forth the rule for "adverse possession of dominant or servient estate" and noting that adverse use extinguishes the benefit of an easement only to the extent it "unreasonably interferes" with the easement). The fact that Washington courts have applied the rule primarily in cases of servient estate owners seeking to extinguish easement rights of dominant estate holders does not make this issue a question of "first impression." The law is clear that Heine needed to show "interference" with the easement rights of the other dominant estate holders, and he failed to do so. The appellate court correctly concluded that the uses by Heine/the Styles (including fencing, planting, mowing, or gardening) did not interfere with the rights of the other estate owners to use the land for overhead or underground utilities.

B. The Alleged Conflict with the *Timberlane* Case Does Not Present an Issue of Public Interest

Heine makes a conclusory assertion that the appellate court's decision on the adverse possession as it relates to the precedent set by Timberlane is an issue of "public interest." Heine does not offer any argument or case law as to why the matter is one of public interest.

Generally, a decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). In determining whether an issue involves a public interest, courts consider "the public or private nature of the question, the need for future guidance provided by an authoritative determination, and the likelihood of recurrence." *Eide v. Dep't of Licensing*, 101 Wn. App. 218, 222, 3 P.3d 208, 210 (2000).

Heine claims that the alleged conflict with the *Timberlane* case represents an issue of public interest, but does not explain the basis for his conclusory determination. As stated above, the appellate court's opinion does not directly conflict with the *Timberlane* case nor does it answer a question of first impression. However, even if both claims were true, neither conflicting precedent nor a case being one of first impression

automatically means the matter is one affecting the public interest. This is a case involving a private dispute between parties regarding adverse possession over land burdened by an easement. The appellate court's decision was necessarily guided by the specific facts regarding the parties' ownership, use, and possession of the property as is true in every adverse possession claim. It is unlikely the specific, unique facts presented by this case will repeat themselves, and the court's decision is therefore unlikely to cause confusion or unnecessary litigation amongst future adverse possession claimants.

C. Heine's Shifting Easement Theory Also Does Not Present an Issue of Public Interest

Heine also raises the "public interest" argument with respect to his shifting easement theory, in which Heine argues that the Easement for ingress and egress shifted to the area currently occupied by the gravel road. As a preliminary matter, it should be noted that Heine's shifting easement theory was raised for the first time on appeal and arguably was not grounds for appellate review. Arguments or theories not presented to the trial court will generally not be considered on appeal. RAP 2.5(a); *Hansen v. Friend,* 118 Wn.2d 476, 485, 824 P.2d 483 (1992). The appellate court nevertheless addressed the theory, and now Heine contends

the issue is within the public interest for the primary reason that he thinks the appellate court's reasoning was flawed.

If disagreement with a court's decision was enough to invoke the public interest prong of review, then virtually every disgruntled litigant who lost his or her case would be able to obtain review by this Court. There is no authority suggesting disagreement with a court's decision is an adequate basis to establish public interest, or that it can be established by "furthering the purpose" of a particular legal doctrine. Heine must show that the appellate court's decision is likely to cause substantial confusion and unnecessary litigation on a common issue. Instead, he argues that the appellate court erred in concluding (1) Heine and his predecessors failed to meet the "continuous use" element of adverse possession and that (2) in taking into account the location of utilities in determining whether the easement had shifted for purposes of ingress or egress. These are just two of many potential avenues for distinguishing the *Curtis* and *Barnhart* cases. For example, both *Curtis* and *Barnhart* were disputes over private easement rights to streets that were never used in their original platted locations, while this case involves a dispute over rights to a gravel road that has been continuously used within the original boundaries expressly established by Declaration of Easement. Moreover, in *Barnhart*, there were facts establishing a clear intent to abandon private easement rights to

a specific location that simply do not exist here. Finally, in *Curtis*, there was a clear case for adverse possession where defendants had built a *house* (i.e., permanent obstruction) over a portion of the platted road that clearly precluded the plaintiff's use of the street.

Heine may understandably think that the appellate court "got it wrong" in dismissing his shifting easement claim, but he fails to show why the appellate court's decision rises to the level of public interest. The appellate court applied the basic elements establishing adverse possession and prescriptive use to the specific facts of this case, and found Heine's claim lacking. Even if the appellate court did commit some error in its decision, there is little confusion that will be generated by this case where a future court's analysis will undoubtedly be based on unique facts distinguishable from this matter.

VI. CONCLUSION

The appellate court applied the correct legal standard to Heine's adverse possession claims by taking into account the scope of use under the original Easement, which allows for Heine, the Stows, and their neighbors to use a 30-foot strip of land owned by Respondent Purdy for egress, ingress, and utilities. The appellate court properly concluded that in light of the scope of use under the Easement and the historical use of the eastern portion of the easement, Heine's and his predecessor's use of

his property was insufficient to establish hostile use. The fact that the court did not expressly distinguish its analysis regarding extinguishment of an easement versus adverse possession over fee title to a servient estate does not entitle Heine to review by this Court, especially where Heine himself has asked this Court to make a ruling applying the same improper standard to both issues.

Finally, Heine has failed to make any compelling argument as to why the appellate court's decision presents issues of public interest. Heine needed to demonstrate why the opinion is going to sow confusion and create unnecessary litigation regarding a common legal issue. He instead chose to apply his own standard regarding what constitutes public interest.

For all the reasons stated above, this Court should decline review of this matter.

DATED THIS 19th day of January, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify under penalty of perjury and the laws of the State of Washington that on the below date, I caused a true and correct copy of Respondents Stows' Answer to Petition to be delivered via the method indicated below to the following party(ies):

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DATED January 19, 2021.

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